(5)

No. 97-6203

In The

Supreme Court of the United States

October Term, 1997

NATHANIEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does 18 U.S.C. § 2119(1)-(3) describe sentencing factors or elements of the offense?

2. If 18 U.S.C. § 2119(1)-(3) sets forth sentencing factors, is the statute constitutional?

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OPINIONS BELOW

The initial opinion and sentencing order by the district court is unreported. Relevant portions appear in the Joint Appendix at J.A. 11. The published opinion of the court of appeals, filed on July 6, 1995, affirming petitioner's conviction and vacating his sentence, is reported at 60 F.3d 547 (9th Cir. 1995). A copy appears in the Joint Appendix at J.A. 19. The opinion by the district court upon resentencing is unreported. The unpublished memorandum opinion of the court of appeals filed on June 27, 1997, affirming the resentencing order, is noted at 116 F.3d 1487 (9th Cir. 1997) (table). A copy appears in the Joint Appendix at J.A. 41.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 27, 1997. The petition for writ of certiorari was timely filed on September 25, 1997. 28 U.S.C. §2101(c); Supreme Court Rules 13.1 and 13.4. Certiorari was granted on March 30, 1998. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CARJACKING, TITLE 18 U.S.C. SECTION 2119 (1992):

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

STATEMENT OF THE CASE

The issue in this case is whether a criminal statute, which specifically identifies factual circumstances relating to the commission of the offense, sets forth elements that must be alleged in the indictment and proved

beyond a reasonable doubt at trial, as opposed to factors relevant to sentencing only. Here, petitioner was sentenced for an aggravated crime of carjacking involving "serious bodily injury," even though the indictment and proof at trial pertained only to the elements of simple carjacking. Petitioner had no notice, prior to or at trial, of any allegation that "serious bodily injury" resulted to any person from the offense.

The indictment, filed December 30, 1992, charged petitioner Nathaniel Jones with one count of carjacking, in violation of 18 U.S.C. §2119, and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1). At the time of the offense, the maximum penalty for carjacking was 15 years imprisonment under section 2119(1), increased to 25 years under section 2119(2) if the offense resulted in "serious bodily injury" as defined in 18 U.S.C. §1365(g)(3),[1] and increased to life imprisonment under section 2119(3) if death resulted from the offense. The indictment did not allege that the offense resulted in "serious bodily injury." J.A. 4-5.

When petitioner was arraigned on the indictment on January 13, 1993, the magistrate judge advised him that the maximum penalty on count one was 15 years imprisonment and the maximum on count two was five

[1] "Serious bodily injury" is defined as injury which involves: "(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. §1365(g)(3).

years. J.A. 7. In the discovery provided by the government before trial, there was information that a victim, Ali Nassar Mutanna, had been hit on the side of the head. However, there was no information to suggest that he or any person had suffered any type of serious injury from the offense, and the government's trial brief did not mention any such injury.[2] C.R. 43.

Jury trial began on July 27, 1993. At trial, the government presented evidence as follows: On December 7, 1992, at approximately 9:45 p.m., petitioner Nathaniel Jones, and co-defendants Donovan Oliver and Darryl McMillan, drove a blue Cadillac to a liquor store in Bakersfield, California. R.T. 457-459. The Cadillac pulled up near the side of the store and parked. Petitioner and Oliver exited the car. R.T. 461-462. The victims, Ali Nassar Mutanna and Abdullah Mardaie, were sitting in Mutanna's tan Honda, which was parked near the side of the store with the engine running. Mutanna saw the two men exit the blue Cadillac and come towards him. One of them, later identified as Oliver, had a gun. R.T. 158, 162-163. Mutanna testified that he was directed to exit the car and was pulled behind the liquor store, where Oliver held a gun on him and robbed him. While Mutanna was on the ground, Oliver hit and kicked Mutanna. R.T. 165. Oliver then entered the back seat of the Cadillac, which was driven by McMillan. R.T. 167.

While Mutanna was behind the liquor store, Mardaie was still inside the tan Honda. He was directed to exit by

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[2] R.T. is the Reporter's Transcript dated July 27-29, 1993. C.R. is the Clerk's Record of the case in the District Court.

one of the men, robbed, and then told to get back in the car. R.T. 388. Immediately after the Cadillac left the liquor store, petitioner got into the tan Honda with Mardaie and drove away. R.T. 168. After driving a short distance, petitioner instructed Mardie to leave the car, which he did. R.T. 390-391. Petitioner was arrested shortly thereafter by officers who had followed the tan Honda. R.T. 171, 309-311. Oliver and McMillan were arrested soon afterwards during a search of the surrounding area. R.T. 296, 361-362. In the blue Cadillac, officers recovered the gun reportedly used by Oliver. R.T. 356.

The government presented no evidence of serious bodily injury at trial. The jury was instructed that to establish carjacking it must find beyond a reasonable doubt that (a) petitioner had taken a motor vehicle while possessing a firearm; (b) the motor vehicle had been transported, stripped, or received in interstate commerce; and (c) the vehicle was taken by force or intimidation. The jury was not instructed to find whether "serious bodily injury" resulted from the carjacking offense. J.A. 10. On July 29, 1993, petitioner was found guilty on both counts of the indictment. C.R. 59.

Petitioner first received notice of the "serious bodily injury" allegation when he received a copy of the draft presentence report several weeks after the trial had concluded. That report indicated that Mutanna had suffered a perforated eardrum, causing numbness and some hearing loss. Petitioner then requested and received from the probation office a copy of medical records relating to the ear injury. At that point, it was more than 12 months after the offense had occurred, and the physician who examined Mutanna was no longer in the area. C.R. 84.

On December 13, 1993, petitioner was sentenced to 25 years on count one and 5 years on count two, to run consecutive to each other, for a total term of imprisonment of 30 years. At sentencing, the district court overruled petitioner's objection to the presentence report's conclusion that Mutanna suffered "serious bodily injury" from the offense.[3] J.A. 12. An appeal of the conviction and sentence was filed. In a published decision, *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), the Ninth Circuit affirmed petitioner's judgment of conviction, finding that serious bodily injury was only a sentencing factor, but vacated the sentence and remanded to the district court for resentencing because of an error under the sentencing guidelines. J.A. 19. Upon resentencing, the court imposed a term of imprisonment of 20 years on Count One and a term of 5 years on Count Two, to run consecutively, for a total sentence of 25 years. On appeal from the district court's re-sentencing order, the Ninth Circuit affirmed the convictions and sentence on June 27, 1997. J.A. 41.

SUMMARY OF ARGUMENT

Under 18 U.S.C. §2119(1), carjacking is subject to a maximum penalty of 15 years imprisonment. Under 18 U.S.C. §2119(2), carjacking with resulting serious bodily injury is subject to a maximum penalty of 20 years imprisonment. The indictment returned against petitioner

[3] Reporter's Transcript, Sentencing hearing dated December 13, 1993.

did not allege serious bodily injury, and no evidence of such injury was presented to the grand jury. When petitioner was arraigned on the indictment, he was advised by the magistrate judge that the maximum penalty on the carjacking count was 15 years imprisonment, and both the plea negotiations and the trial proceeded on that basis.

The government's discovery did not disclose, and its trial brief did not mention, any type of serious bodily injury associated with the offense. No evidence of serious bodily injury was presented at trial, and the jury was not instructed on that issue. Petitioner received no notice of a serious bodily injury allegation until the draft presentence report prepared after conviction. Based upon that report, the district court found that a victim had suffered serious bodily injury and, based upon that finding, the court sentenced petitioner to 20 years on the carjacking count, 5 years more than the statutory maximum absent serious bodily injury.[4]

When petitioner protested the lack of notice of the serious bodily injury allegation, its absence from the indictment returned by the grand jury, and the failure of the government to prove the allegation to the jury beyond reasonable doubt, the response of the district court and then the court of appeals was that serious bodily injury was not an element of the offense with the attendant

[4] Thus, this case is unlike *Edwards v. United States*, 118 S.Ct. 1475, 1477-1478 (1998), where the fact to be determined by the sentencer did not increase the statutory range of punishment, but rather related to what sentence would be imposed from within that range.

constitutional protections, but merely a factor to be considered at the post-trial sentencing.

In so construing §2119, the Ninth Circuit relied upon the structure of the statute, its titling, and its legislative history. However, the structure of §2119, especially when viewed in the context of other federal criminal laws incorporating serious bodily injury or related injury concepts, does not support the interpretation advanced by the Ninth Circuit. In addition, the statutory titles are too generalized to provide a reliable indicator as to congressional intent on whether serious bodily injury is an element of the crime or a sentencing factor. Finally, the Ninth Circuit read too much into what little legislative history there is, which is too unfocussed and summary in nature to support the court's opinion. However, there are factors, overlooked by the Ninth Circuit, which point to an interpretation of serious bodily injury as an element of the offense under section 2119(2).

First, serious bodily injury is a fact linked to and intertwined with the facts constituting the criminal offense. Such facts have traditionally been preliminarily found by the grand jury in returning an indictment, and ultimately resolved by the jury beyond a reasonable doubt in returning a verdict, unlike the recidivism facts pertaining to the offender analyzed in *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998).

Second, in establishing the particularized robbery offense of carjacking, Congress legislated against the backdrop of existing state robbery statutes and was aware of and guided by state practice in this area. In this regard, the states that have incorporated serious bodily injury

into their robbery statutes have generally done so by making it an element of a separate offense of aggravated robbery.

Third, a 1994 amendment to the carjacking statute established that "if death results" was an element of the offense under §2119(3). There is no reason why serious bodily injury should not be given parallel treatment under §2119(2).

In addition, the rule of lenity requires that ambiguity in a criminal statute should be resolved in the favor of the defendant. *E.g., United States v. Granderson*, 511 U.S. 39 (1994). At the very least, there is a fundamental ambiguity in §2119 as to whether serious bodily injury should be construed as an element of the offense or only a factor for sentencing. Under the rule of lenity, the Court should construe it as an element with the attendant constitutional protections.

On the other hand, if serious bodily injury were construed as a sentencing factor, then it would be invalid under the Fifth Amendment. That amendment, as construed by the Court, prohibits classification of a fact of the criminal offense which exposes the defendant to a significantly greater maximum term of imprisonment as merely a sentencing factor. Unlike recidivism facts regarding the offender, which have been treated as sentencing factors and can be determined by the sentencer under a preponderance of the evidence standard (*Almendarez-Torres*, 118 S.Ct. 1219), facts involving the means of committing the crime which the government seeks to punish with a greater statutory penalty must be alleged

in an indictment and found by a jury beyond a reasonable doubt. *E.g., Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Finally, given the grave doubts regarding the constitutionality of the statute which would otherwise arise, the principle of constitutional doubt requires the Court to construe serious bodily injury as an element of the offense under §2119(2).

ARGUMENT

I.

DETERMINATION OF THE FACT OF THE OFFENSE OF CARJACKING THAT INCREASES THE STATUTORY MAXIMUM BY TEN YEARS – THE INFLICTION OF SERIOUS BODILY INJURY – MUST BE SUBJECT TO THE CONSTITUTIONAL PROTECTIONS OF A GRAND JURY INDICTMENT, JURY TRIAL, AND PROOF BEYOND A REASONABLE DOUBT

The initial inquiry is whether "serious bodily injury" in 18 U.S.C. §2119(2), is an element defining a separate crime of aggravated carjacking or only a factor which a sentencing court may use to increase the punishment for the crime of carjacking. *Almendarez-Torres*, 118 S.Ct. at 1223. If classified merely as a sentencing factor, the fact of serious bodily injury would not have to be stated in the indictment,[5] found by the jury,[6] or proved beyond a reasonable doubt.[7] In addition, the evidence presented to

[5] *Almendarez-Torres*, 118 S.Ct. at 1223.

[6] *Spaziano v. Florida*, 468 U.S. 447, 459 (1984).

[7] *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

establish the fact of serious bodily injury would need not be either subject to cross-examination[8] or admissible under the Federal Rules of Evidence.[9]

In order to interpret section 2119, the Court must review "the statute's language, structure, subject matter, content and history." *Almendarez-Torres*, 118 S.Ct. at 1223. Such a review shows that Congress intended serious bodily injury to be an ingredient of the offense under 18 U.S.C. §2119(2), with the accompanying constitutional protections. The Court should so hold.

A. The Statutory Language and Structure

The statutory language and structure of 18 U.S.C. §2119 provide no reliable indicia as to Congress' intent in classifying serious bodily injury.

First, in enacting section 2119,[10] Congress did not expressly state that serious bodily injury was not an

[8] 18 U.S.C. §3661.

[9] Fed.R.Evid. 1101(d)(3).

[10] The statute, as enacted in 1992, provided:

> Whoever, possessing a firearm as defined in Section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

element of the offense under 18 U.S.C. §2119, or that the defendant was not entitled to notice thereof prior to conviction, or that the fact of the injury was to be determined by the court, by a preponderance of evidence, after conviction and before sentencing. *Compare McMillan v. Pennsylvania*, 477 U.S. 79, 81 n. 1 (1986).

Second, serious bodily injury was included in the statute which first established carjacking as a federal crime. Thus, this is not a case where the elements of the offense at issue were already established and where a factor was added by Congress to enhance an existing crime. *Compare United States v. Jackson*, 824 F.2d 21, 24, 25 (D.C. Cir. 1987).

Third, serious bodily injury was not placed in a statutory subsection with a subject matter title expressly addressed to penalty or sentencing.[11] *Compare* 18 U.S.C. §111(b) (subsection entitled "Enhanced penalty" provides for increased maximum punishment for assault where defendant inflicts bodily injury); 18 U.S.C. §2262(b)(2) and (3) (subsection entitled "Penalties" provides for increased maximum punishment for interstate violation of protective order where serious bodily injury to the victim or life threatening bodily injury to the victim results); 21 U.S.C. §841(b) (subsection entitled "Penalties"

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(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

[11] As the Court has pointed out, "a title that contains the word 'penalties' more often, but certainly not always, signals a provision that deals with penalties for a substantive crime." *Almendarez-Torres*, 118 S.Ct. at 1226 [citation omitted].

provides for increased minimum and/or maximum punishment for drug offenses where serious bodily injury results); 21 U.S.C. §960(b) (same). Nor is the carjacking statute one where the elements of the offense and the punishment are set forth in separate (albeit untitled) subsections. *Compare* 8 U.S.C. §1324(b)(iii) (increased maximum punishment for bringing in or harboring an alien where the defendant causes serious bodily injury); 18 U.S.C. §247(d)(2) and (3) (increased maximum penalty for use of hazardous or injurious devices on federal lands where bodily injury or serious bodily injury to a person results).

Fourth, section 2119's serious bodily injury language lacks "other common indicia of sentence enhancements provisions." *United States v. Davis*, 801 F.2d 754, 756 (5th Cir. 1986). The statute does not a) predicate punishment upon conviction under another statutory section or subsection; b) derive its penalty as a multiplier of a penalty set forth in another section or subsection; c) bear a title as a sentencing provision; or d) provide a procedure for a sentencing hearing on the issue. *Davis*, at 755-756; *see also United States v. Rumney*, 867 F.2d 714, 718 (1st Cir. 1989).

The Ninth Circuit based its finding that Congress intended 18 U.S.C. §2119(1)-(3) to be sentencing factors, rather than elements of the offense, primarily on the argument that subsections (1)-(3) "could not stand alone, independent of the main paragraph." J.A. 30. However, in light of the substantial impact on the defendant's constitutional rights arising from classification as a sentencing factor, this structural feature should not be treated as conclusive on the issue of Congress's intent in classifying serious bodily injury. *Cf. United States v. Resaq*, 134 F.3d

1121, 1137 (D.C. Cir. 1998); *United States v. Michael*, 10 F.3d 838, 840 (D.C. Cir. 1993).

This is particularly true, given the fact that, while Congress has incorporated the concept of bodily injury and degrees thereof into numerous federal criminal statutes, it has not done so in a consistent manner. In reviewing those statutes, certainly no pattern appears that provides a reliable indicator as to Congress's intent regarding whether the injury factor is to be an element of the offense or merely a sentencing factor. In some statutes, serious bodily injury or a similar factor is set forth in the definition of the crime. *E.g.*, 10 U.S.C. §928, 18 U.S.C. §37, 18 U.S.C. §1091, 18 U.S.C. §1153(a), 18 U.S.C. §2332(c). In other statutes, the injury factor is placed in the definition of the crime, and then repeated in the penalty provisions. *E.g.*, 18 U.S.C. §831, 18 U.S.C. §1959, 18 U.S.C. §2261, 18 U.S.C. §2332B. In still other statutes, the injury factor is set forth in a subsection entitled "Penalties." *E.g.*, 18 U.S.C. §2262(b), 21 U.S.C. §841(b), 21 U.S.C. §960(b). In 18 U.S.C. §43, serious bodily injury is placed in subsection (b), entitled "Aggravated Offense," whereas in 18 U.S.C. §111, bodily injury appears in subsection (b), entitled "Enhanced penalty." 18 U.S.C. §113 provides that "Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows," with separate provisions for seven different categories of assault. Thus, the structure of a particular federal statute, in itself, provides little guidance as to whether Congress intended an injury factor to be an element of the offense with the attendant constitutional protections, or merely a sentencing factor.

B. The Statutory Subject Matter

The statutory fact, serious bodily injury, is a fact associated with the commission of the crime, rather than the history of the offender. As such, it is the type of fact that has historically been determined, and is best determined, by a jury beyond a reasonable doubt.

In *Almendarez-Torres*, the Court found that in 8 U.S.C. §1326(b)(2), the fact of the prior conviction was a sentencing factor increasing the maximum prison term for a deported alien returning to the United States without permission, where the reentering alien has a prior aggravated felony conviction. *Almendarez-Torres*, 118 S.Ct. at 1223-1226. In doing so, the Court repeatedly stressed the nature of the statutory factor as one traditionally addressed at sentencing: "the relevant statutory subject matter is recidivism . . . as typical a sentencing factor as one might imagine" (*Id.*, at 1224), "one of the most frequently found factors that affects sentencing" (*Id.* at 1229), "a traditional, if not the most traditional basis for a sentencing Court's increasing an offender's sentence" (*Id.* at 1230). Prior convictions relate to the offender, and not the offense, and facts relating to the offender have traditionally been treated as sentencing factors to be determined by the court. Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S.Cal. L.Rev. 289, 302-303 (1992). In particular, "under traditional sentencing procedures, proof of a defendant's prior felony convictions typically is the type of individual background information considered by the judge, and not the jury." *United States v. Forbes*, 16 F.3d 1294, 1299 (1st Cir. 1994).

Moreover, as the Court pointed out, the existence of a prior conviction is a fact "almost never contested" (*Almendarez-Torres*, 118 S.Ct. at 1226) and, if contested, is usually readily determined by the relevant court documents. Thus, "the primary rationale for requiring sentencing factors to be submitted to a jury – the necessity for accurate factfinding – does not apply in the instant case. Prior convictions are highly verifiable matters of record which need not be subject to jury inquiry." *Rumney*, 867 F.2d at 719 (quoting *United States v. Brewer*, 853 F.2d 1319, 1326 (6th Cir. 1988)).

Furthermore, a fact issue regarding recidivism will presumably have already been determined in a manner, consistent with due process, that ensures that the issue was fairly and accurately determined. Thus, the facts supporting a prior conviction will have been determined following an indictment by grand jury and through proof to a petit jury beyond a reasonable doubt (or by an informed, intelligent waiver thereof). Given the reliability associated with these procedures, there would generally be no need to relitigate the recidivism fact issue. *See Brewer*, 853 F.2d at 1326 ("Because defendants had received the totality of protections due in the prior proceedings, no additional fact finding is necessary").

Finally, as the Court recognized, due to the nature of the evidence involved, classifying a prior conviction as an element of an offense "risks unfairness" to the defendant. *Almendarez-Torres*, 118 S.Ct. at 1226. "[I]f the disputed provision were deemed a separate element, the government would be required to place evidence of the defendant's prior felony convictions before the jury." *Forbes*, 16 F.3d at 1299. "The inherently prejudicial nature of this

kind of evidence is well known." *Jackson*, 824 F.2d at 25. Accordingly, "we do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested." *Almendarez-Torres*, 118 S.Ct. at 1226.

By contrast, "[h]ere the factor to be classified as an element or a sentence enhancer is radically different. . . ." *Michael*, 10 F.3d at 842. First, the question of serious bodily injury is closely related to and intertwined with the facts of the offense. It thus presents issues that have traditionally been resolved by – and are best resolved by – the jury. *See Michael*, 10 F.3d at 842 ("[h]ere the factor in question is . . . an aspect of the events associated with the crime itself and a fact that juries typically resolve").[12]

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[12] Where the statutory factor is an aspect of the events associated with the crime itself, the Courts of Appeals have often treated it as an element of the offense to be alleged in the indictment and proved to a jury beyond a reasonable doubt. For example, a majority of courts to have addressed the issue have held that the nature and quantity of the drug is an element of the offense under 21 U.S.C. §844(a). *See United States v. Stone*, 139 F.3d 822, 1998 WL 191046 (11th Cir. (Fla.), 1998); *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960); *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994); *United States v. Sharp*, 12 F.3d 605 (6th Cir. 1993); *Michael*, 10 F.3d 838; *United States v. Puryear*, 940 F.2d 602 (10th Cir. 1991); *see, contra*, *United States v. Butler*, 74 F.3d 916 (9th Cir. 1996); *United States v. Smith*, 34 F.3d 514 (7th Cir. 1994); *United States v. Monk* 15 F.3d 25 (2d Cir. 1994). In like manner, the drug distributer's status as a minor under former 21 U.S.C. §841(a)(1) has been held to be an element of the offense. *United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976).

Similarly, value has been held to be an essential element of several different federal offenses, including theft of government property under 18 U.S.C. §641 (*e.g.*, *United States v. Alberico*, 604

Second, the existence of serious bodily injury as defined by 18 U.S.C. §1365(g)(3)[13] is often likely to be a highly disputed issue, which requires the accurate fact finding associated with jury determination of facts beyond a reasonable doubt. *See Rumney*, 867 F.2d at 719.

Third, unlike a fact issue regarding recidivism, there will have been no prior adjudication of a fact issue associated with the crime. Thus, in order to ensure a fair and accurate determination of this fact, for which the government is seeking to punish the defendant, it should be adjudicated under normal due process standards, including grand jury indictment and proof to a jury beyond a reasonable doubt.

Finally, because of the close connection between the facts of the offense and the question of serious bodily injury, there is little additional prejudice to the defendant in having the government prove the latter to the jury. Indeed, the government will most often seek to introduce

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F.2d 1315, 1321 (10th Cir. 1979); *Theriault v. United States*, 434 F.2d 212, 214 (5th Cir. 1970)); stealing goods from interstate shipment under 18 U.S.C. §659 (*e.g., United States v. Scanzello*, 832 F.2d 18, 22-23 (3d Cir. 1987)); and larceny from a bank under 18 U.S.C. §2113(b) (*e.g., United States v. Luckey*, 655 F.2d 203, 204-205 (9th Cir. 1981)).

[13] The statute provides:

> "the term 'serious bodily injury' means bodily injury which involves –
>
> (A) a substantial risk of death;
>
> (B) extreme physical pain;
>
> (C) protracted and obvious disfigurement; or
>
> (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

this evidence to provide the context of the crime to the jury. *See Resaq*, 134 F.2d at 1136 (Under 49 U.S.C. §1472, the air hijacking statute, "[t]he fact that a death resulted from a hijacking is 'closely related' to the circumstance of the hijacking; indeed, this fact will ordinarily be admissible at trial, to prove that the defendant used force or intimidation in committing the crime.") Thus, in contrast to the prior conviction factor in 8 U.S.C. §1326, the nature of the serious bodily injury inquiry indicates that it must be classified as an element of the offense established by 18 U.S.C. §2119, with the attendant constitutional protections.

In short, the *Almendarez-Torres* Court found the prior conviction to be a sentencing factor, largely because recidivism issues such as prior convictions have traditionally been sentencing matters for the court. In contrast, serious bodily injury is the type of factual issue associated with the criminal conduct that has traditionally been relegated to the jury for determination. As the Court of Appeal stated in *Jordan v. U.S. District Court for District of Columbia*, 233 F.2d 362 (D.C. Cir.), *vacated on other grounds sub nom. Jordan v. United States*, 352 U.S. 904 (1956):

> where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished . . . we think . . . that the facts in aggravation must be charged in the indictment and found to be true by the jury.

Id., at 367.

C. The Legislative History

18 U.S.C. §2119, enacted as part of the Anti Car Theft Act of 1992, Public Law 102-519, 102nd Congress, 106 Stat. 3384, was contained in Title I of the Act entitled "Tougher Law Enforcement Against Auto Theft," under Subtitle A entitled "Enhanced Penalties for Auto Theft." Subtitle A contained five sections:

§101: Federal Penalties for Armed Robberies of Autos, which added 18 U.S.C. §2119;

§102: Importation and Exportation, which *enhanced* the maximum penalty for importation and exportation of stolen motor vehicles under 18 U.S.C. §553 from 5 years to 10 years;

§103: Trafficking in Stolen Vehicles, which *enhanced* the maximum penalty for transportation, sale or receipt of stolen vehicles under 18 U.S.C. §§2312 and 2313(a) from 5 years to 10 years;

§104: Civil and Criminal Forfeiture, which *extended* the civil forfeiture and criminal forfeiture statutes (18 U.S.C. §§981(a)(1) and 982(a)) to provide for forfeiture of property representing the proceeds of auto theft crimes;

§105: Chop Shops, which added 18 U.S.C. §2322, proscribing the owning or operating of a chop shop.

According to its descriptive title, Subtitle A provided "Enhanced Penalties for Auto Theft." It did so by increasing the maximum punishment under three existing statutes (Secs. 102 and 103), providing for additional civil and criminal forfeiture penalties (Sec. 104), and establishing two new offenses (Secs. 101 and 105). Contrary to the

opinion of the Ninth Circuit herein (J.A. 31), the descriptive title and subtitle of the Act do not address, much less resolve, the question of whether Congress intended "serious bodily injury" in 18 U.S.C. §2119 to be a sentencing factor or an element of the offense.[14] *See Forbes*, 16 F.3d at 1298 ("Nor does the title of the statute offer sufficient guidance about whether subsection (b) [of 8 U.S.C. §1326] is a sentence enhancer or a separate element of the crime").

The Ninth Circuit also relied upon the legislative history as suggesting an intent that §2119 set forth enhanced penalties. J.A. 31. To the contrary, the legislative history is too "imprecise" to provide reliable evidence of such congressional intent. *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Colleries*, 512 U.S. 267, 280 (1994).[15]

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[14] The Ninth Circuit stated, "Clearly the title, and undoubtedly the subtitle, suggest an intent that §2119 set forth enhanced penalties." J.A. 31. The court's reliance on titles is misplaced. The title "Tougher Law Enforcement Against Auto Theft," to the degree that it was intended to encompass §2119, merely refers to that section's establishment of the federal crime of carjacking, a new form of auto theft. Similarly, the subtitle "Enhanced Penalties for Auto Theft," to the degree it was intended to refer to §2119, merely refers to the increased punishment set for a particular type of auto theft, *i.e.*, the new crime of carjacking established by that section.

[15] In any event, "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J. concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.). See discussion of rule of lenity at pages 29-30, *infra*.

The legislative history of 18 U.S.C.A. §2119 is comprised of the report of the House Judiciary Committee, No. 102-851(I)[16], the report of the House Energy and Commerce Committee, No. 102-851(II)[17], and the report of the House Ways and Means Committee, No. 102-851(III).[18] No Senate report was submitted with the legislation. The signing statement by the President of the United States, the Honorable George W. Bush, appears in the published legislative history. With attachments, the three committee reports run for seventy-three pages. While there is considerable discussion in these reports regarding other parts of the bill, such as identifying auto parts, there is little regarding the offense of carjacking or the intent of Congress in establishing that crime. There is certainly no evidence that Congress made a considered choice to classify serious bodily injury as a sentencing factor, rather than an element of the offense.

Thus, when the Anti Car Theft Act of 1992 was first approved by the House Committee on the Judiciary, the House Report stated:

> H.R. 4542 contains four titles. Title I increases federal sentences for auto theft, provides new asset forfeiture remedies against auto thieves, provides funding assistance to law enforcement, and creates a new crime for armed carjacking."

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[16] H.R. 102-851(I) 102nd Cong., 2d Sess., U.S. Code Cong. & Admin. News 2829 (1992). The legislative history of 18 U.S.C. §2119 appears at U.S. Code Cong. & Admin. News 2829-903.

[17] H.R. 102-851(II) 102nd Cong., 2d Sess., U.S. Code Cong. & Admin. News 2844 (1992).

[18] H.R. 102-851(III) 102nd Cong., 2d Sess., U.S. Code Cong. & Admin. News 2895 (1992).

H.R. Rep No. 102-851(I), 102nd Cong., p.13, reprinted in 1992 U.S.C.C.A.N. 2830.[19] When the bill was amended and reported out by the House Committee on Energy and Commerce, the report stated:

> Title I of the Committee amendment contains provisions which include a new Federal Crime for armed "carjacking". The Committee adopted an amendment offered by Mr. Bliley to section 101(a) of H.R. 4542 as reported by the Committee on the Judiciary increasing the maximum prison term for carjacking to 25 years, instead of 15 years as in the Judiciary bill, when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine.

H.R. Rep No. 102-851(II), 102nd Cong., p.14, reported in 1992 U.S.C.C.A.N. 2847. The committee reports generally describe one *effect* of the original version of the bill and of its subsequent amendment. As the D.C. Circuit stated in a similar context, "We note there is some ambiguity in the remarks quoted. Even where a provision adds a new crime accompanied by severe penalties, it would hardly be startling for a member of Congress to characterize it as increasing penalties which would in fact be one of its effects." *Michael*, 10 F.3d at 841. The critical point is that the committee reports do not address the question of classification of serious bodily injury as an element or as

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[19] See also *Id.* at 16, reported in 1992 U.S.C.C.A.N. 2832:

> H.R. 4542 would enable a greater contribution by federal law enforcement agencies by creating a new federal crime for carjacking, by establishing new forfeiture remedies against auto thieves, and by increasing the sentences for existing federal crimes related to auto theft.

a sentencing factor. *Cf. Almendarez-Torres*, 118 S.Ct. at 1242 (Scalia, J., dissenting) (legislative history showing intent to increase penalties does not resolve whether statute does so by adding penalties to an existing offense or by creating an additional, more severely punished offense).

Thus, contrary to the suggestion of the Ninth Circuit, this limited and ambiguous legislative history provides no reasonable basis for concluding that Congress chose to classify serious bodily injury as a sentencing factor and thereby to deny a criminal defendant fundamental constitutional rights as to that issue.

D. Prevailing State Practice

It is reasonable to assume that in establishing the new federal offense of carjacking, Congress was aware of, and guided by, the practices of the various states in codifying similar offenses. *Cf., Morrissette v. United States*, 342 U.S. 246, 263 (1952); *Almendarez-Torres*, 118 S.Ct. at 1242 (Scalia, J., dissenting). Since carjacking is but a particularized form of robbery, Congress presumably looked to state robbery laws to determine how those statutes treated serious bodily injury or comparable factors. A review of state practice in this area would have shown that the states have treated serious bodily injury, a fact relevant to the means of committing the crime, different than a recidivism factor, such as prior convictions. As set forth in tabular form in the Appendix hereto, the states that have incorporated serious bodily injury or a comparable injury factor into their robbery statutes have generally done so by making the factor an element of an

offense of aggravated robbery[20] or of robbery in the first degree.[21] The aggravated offense has generally been set forth in a separate statutory section from the general robbery statute[22] and classified as a different class of felony than robbery.[23]

The practice of the states with regard to their robbery statutes is in accord with the general rule regarding indictments. As Professor Bishop stated in his criminal procedure treatise,

> [E]very wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment. . . . This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the

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[20] Arkansas, Colorado, Kansas, Minnesota, Tennessee, Texas, Utah, Wyoming.

[21] Alabama, Alaska, Connecticut, Delaware, Guam, Hawaii, Iowa, Kentucky, Missouri, New York, Oregon, Pennsylvania, Rhode Island, Virgin Islands, Washington.

[22] Alabama, Alaska, Arkansas, Colorado, Connecticut, Guam, Hawaii, Iowa, Kansas, Kentucky, Minnesota, Missouri, New York, Oregon, Tennessee, Texas, Utah, Virgin Islands, Washington.

[23] Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Kentucky, Missouri, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington.

common law and confirmed by our written constitutions.

Joel P. Bishop, *Bishop's Criminal Procedure* §77(1)-(2) at 47 (4th ed. 1895); *see also United States v. Reese*, 92 U.S. 214, 232 (1875) ("every ingredient of the offense must be accurately and clearly expressed; or, in other words, . . . the indictment must contain an allegation of *every fact which is legally essential to the punishment to be inflicted*"; emphasis added).

E. Subsequent Legislative Action

As this Court has noted, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 380-81 (1969) (footnote with citations omitted); *see also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of subsequent Congress "entitled to significant weight"). This is "particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding*, 444 U.S. at 596.

In 1994 Congress amended 18 U.S.C. §2119(3) to provide the death penalty as an alternate punishment if death results from a carjacking. Pub.L. No. 103-322, 108 Stat. 1796 (1994). In so doing, Congress established "if death results" as an essential element of the offense under §2119(3). In *Coker v. Georgia*, 433 U.S. 584, 599 (1977), this Court held that a crime "not involving the taking of a life" cannot be a capital crime. Since somebody dying is an irreducible element of a capital offense,

"if death results" is an irreducible element of the offense defined by 18 U.S.C. §2119(3).

In addition, treatment of "if death results" as an element to be alleged in the indictment is necessary to vindicate the grand jury's role in controlling the decision "whether to charge a greater or lesser offense, including the important decision to charge a capital crime." *Campbell v. Louisiana*, 118 S.Ct. 1419, 1423 (1998).

Moreover, at the same time as Congress amended §2119(3) in 1994, it enacted the Federal Death Penalty Statute, 18 U.S.C. §§3591 *et seq.*, including section 3591(a) which provides for a death sentence, after a verdict of death in a hearing under Section 3593, in the case of "(a) defendant *who has been found guilty of* – . . . (2) any other offense for which a sentence of death is provided . . . " (Emphasis added.) By this legislation, Congress confirmed that "if death results" was intended to be an element of the offense of carjacking under §2119(3). A carjacking defendant could not be "found guilty of . . . [an] offense for which a sentence of death is provided," as required by Section 3591, unless the fact of death resulting, the trigger for death penalty eligibility under §2119, was an element of the offense of carjacking to be determined by the jury in returning its finding of guilty.

In *Resaq*, 134 F.3d 1121 (D.C. Cir. 1998), the D.C. Circuit considered whether "if death results" is an element of the offense of air piracy under 49 U.S.C. §1472(n). In doing so, the court analyzed the relationship between §1472 and §1473(c)(2), the air piracy death penalty statute. This relationship directly parallels that between 18

U.S.C. §2119(3) and the general death penalty statute, 18 U.S.C. §3591 *et seq.* The court reasoned that Congress must have intended "if death results" to be an element of air piracy to be tried to the jury because otherwise there would have to be, first, a jury trial as to air piracy, second, a court hearing on death resulting, and finally, a jury trial as to penalty.[24]

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[24] The court's insightful analysis is directly applicable here:

> The United States also points to the structural relationship of section 1472(n) to another statutory provision, section 1473(c)(2). Under that provision, a death-penalty sentencing hearing must be held when a defendant "is found guilty of or pleads guilty to an offense under section 1472(i) or 1472(n) of this title for which one of the sentences provided is death." 49 U.S.C. App. §1473(c)(2). The death-penalty sentencing hearing is to occur "before the jury which determined the defendant's guilt." §1473(c)(2)(A). The hearing may also occur before "a jury impaneled for the purpose of the hearing," but only if the defendant had pleaded guilty, was convicted in a trial without a jury, or if "good cause" existed to discharge the previous jury. §1473(c)(2)(B). Finally, the hearing may be "before the court alone," but only "upon the motion of the defendant and with the approval of the court and Government." §1473(c)(2)(C).
>
> Construing the "death results" provision as a penalty enhancement would be markedly at odds with the structure and purposes of section 1473(c). Section 1473(c) is triggered whenever a defendant "is found guilty of or pleads guilty to an offense under sections 1472(i) or 1472(n) of this title for which one of sentences provided is death"; a defendant can only be found guilty of or plead guilty to a generalized offense under section 1472(n). Before section (1473(c) could apply, there would need to first be a guilty plea or guilty verdict; then an intermediate proceeding, presumably tried to the court (the usual rule at sentencing proceedings) as to whether "death resulted"; and then, if necessary, the death-penalty sentencing hearing provided for in section 1473(c). This structure is inconsistent with the language of section 1473(c), which contemplates a verdict that leads directly into a death-penalty sentencing hearing. It also ignores the strong policy expressed in section 1473(c) of trying all matters related to the imposition of the death sentence to a jury, where possible. If Congress intended to establish an ornate, three-stage procedure for the imposition of the death sentence in air piracy cases – with the middle stage, and only that stage, tried to the court – it would presumably have said so explicitly, either in the statute or in its legislative history. Neither contains any indication that this is what Congress intended.

Id., at 1135-36.

Given that "if death results" is an element under section 2119(3), there is no reason to believe that Congress intended a different outcome for "if serious injury results" under Section 2119(2). *See Almendarez-Torres*, 118 S.Ct. at 1239 n. 3 (Scalia, J, dissenting) ("It would do violence to the text to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are").[25]

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[25] The Ninth Circuit apparently overlooked the import of the 1994 legislation, because it concluded that nothing "even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt." J.A. 32.

F. Conclusion

Neither the statutory language and structure nor the legislative history of the enactment of 18 U.S.C. §2119 provides reliable evidence that Congress intended substantial bodily injury to be merely a sentencing factor. However, the nature of that factor (which is intertwined with the facts of the offense), the prevailing state practice, and subsequent legislative action show that §2119(2) is most reasonably construed as establishing a separate offense with the infliction of serious bodily injury as an essential ingredient.

II.

UNDER THE RULE OF LENITY, SERIOUS BODILY INJURY SHOULD BE CONSTRUED AS AN ELEMENT OF THE OFFENSE OF CARJACKING UNDER 18 U.S.C. § 2119(2), WITH THE ATTENDANT CONSTITUTIONAL PROTECTIONS

Under the rule of lenity, "[w]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). "In these circumstances – where text, structure, and history fail to establish that the government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also Ladner v. United States*, 358 U.S. 169, 177-178 (1957) (" 'when Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity' "); *Simpson v. United States*, 435

U.S. 6, 14-15 (1978); *Toussie v. United States*, 397 U.S. 112, 122-123 (1970).

After reviewing the statutory language, structure, subject matter, context, and history of 18 U.S.C. §2119, at the very least there remains an ambiguity as to the Congressional intent in classifying serious bodily injury, *i.e.*, whether serious bodily injury is an element of the offense to be proved to a jury beyond a reasonable doubt, or merely a factor to be considered by the sentencing judge after conviction. Thus, this is a classic case for application of the rule of lenity, "a time honored interpretive guideline when the Congressional purpose is unclear." *Liparota v. United States*, 471 U.S. 419, 427 (1985). Application of the rule is particularly appropriate in this case. "In the absence of a reasonably clear statement from Congress, at least for a fact embedded in the statutory section defining the crime and closely related to the circumstance of a crime," this Court should not classify serious bodily injury as only a sentencing factor. *See Michael*, 10 F.3d at 842. Doubts should be resolved in petitioner's favor and serious bodily injury construed as an element of the offense under §2119(2). Otherwise, petitioner and those in a similar position will have been denied the constitutional protections of indictment by a grand jury, trial by a petit jury, and proof beyond a reasonable doubt without any reliable evidence that Congress chose such a drastic result.

III.

THE CONSTITUTION REQUIRES THAT "SERIOUS BODILY INJURY" BE CHARGED IN AN INDICTMENT AND BE PROVED BEYOND A REASONABLE DOUBT AT A JURY TRIAL IN ORDER FOR A DISTRICT COURT TO SENTENCE A DEFENDANT IN EXCESS OF THE 15-YEAR STATUTORY MAXIMUM SET FORTH IN 18 U.S.C. §2119(1)

Even if Congress did not intend that "serious bodily injury" be an element of an aggravated carjacking offense that carries a maximum 25-year sentence, the Constitution requires that serious bodily injury be deemed an element in order for the defendant to be imprisoned in excess of the 15-year maximum penalty set forth in 18 U.S.C. §2119(1). As an element, the Fifth Amendment requires that the defendant be provided notice of the serious bodily injury allegation in the indictment (*Hamling v. United States*, 418 U.S. 87, 117 (1974); *Smith v. United States*, 360 U.S. 1, 9 (1959)) and that the government prove such element beyond a reasonable doubt to a jury. *United States v. Gaudin*, 515 U.S. 506 (1995); *Duncan v. State of Louisiana*, 391 U.S. 145, 149 (1968) (trial by jury); *In re Winship*, 397 U.S. 358, 364 (1970) (proof beyond a reasonable doubt).

This Court has established that, where a fact of an offense – in contrast to a characteristic of the offender – significantly increases the authorized penalty beyond the statutory maximum, due process requires that the fact be proven beyond a reasonable doubt at a trial by jury. *See, e.g. Mullaney v. Wilbur*, 421 U.S. 684 (1975); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-91 (1986); *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998). In *Mullaney*, the

Court addressed a Maine statute defining a single crime of homicide, which was divided into two punishment categories: murder carrying a maximum sentence of life imprisonment and manslaughter punishable by not more than 20 years imprisonment. 421 U.S. at 691-692. Where the prosecution established an intentional and unlawful homicide at trial, Maine law required the jury to conclusively presume the existence of malice aforethought as an element of murder, unless the defendant proved "that he acted in the heat of passion on sudden provocation," which would reduce the crime to manslaughter. *Id.* at 686.

The Court in *Mullaney* held that the Maine homicide scheme violated due process by relieving the prosecution of the burden of proving beyond a reasonable doubt the absence of heat of passion so as to subject the defendant to the greater maximum penalty authorized for murder. In reaching its decision, the Court accepted the interpretation of the Maine Supreme Court that murder and manslaughter are punishment categories of the single crime of homicide, rather than separate offenses. *Id.* at 689-90. Even though the absence of heat of passion was not a " 'fact necessary to constitute the *crime*' of felonious homicide in Maine," *Id.* at 697 (emphasis in original), the Court concluded that due process does not permit a state to relieve the prosecution of proving a fact of the offense beyond a reasonable doubt where doing so would expose the defendant to a significantly greater maximum term of imprisonment:

> . . . the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen

to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less 'blameworth[y], . . . they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Id. at 698. The Court emphasized that, if *Winship*'s rule that the prosecution must prove beyond a reasonable doubt each element of a crime "were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect" simply by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* at 698.

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court distinguished the Maine statute in *Mullaney* in examining a New York statute that placed on the defendant the burden of proving as an *affirmative defense* to second-degree murder that the defendant had "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.*, at 198 n.2. The Court declined to adopt a constitutional rule "that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused," explaining that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required." *Id.*, at 210. However, the Court confirmed the import of *Mullaney* that "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of an offense." *Id.* at 215.

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the petitioners challenged the constitutionality of a Pennsylvania statute under the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee. The Pennsylvania statute "provide[d] that anyone convicted of certain enumerated felonies is subject to a mandatory *minimum* sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." *Id.*, at 81 (emphasis added). The Court reaffirmed that, as *Patterson* recognized, "there are constitutional limits to the State's power" in defining crimes; "in certain limited

circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." *McMillan*, at 86.

In rejecting the argument that the Pennsylvania statute improperly relieved the prosecution of its burden of proving all elements necessary to establish guilt as the Maine statute did in *Mullaney*, the Court in *McMillan* stressed that the statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.*, at 87-88. The Court relied on this same ground in distinguishing *Specht v. Patterson*, 386 U.S. 605 (1967), where the Court had overturned a Colorado law that permitted a sex-offender's sentence of not more than 10 years to be increased upon certain post-sentencing judicial findings to an indefinite term of up to life imprisonment. *McMillan*, 477 U.S. at 88.

Moreover, in subsequent cases, the Court has repeatedly characterized *McMillan*'s holding that the Pennsylvania statute was not unconstitutional as relying on the fact that the Pennsylvania statute did not create a greater *maximum* penalty, but only a mandatory *minimum* penalty, where it was shown at sentencing that the defendant committed the crime while visibly possessing a firearm. *See Schad v. Arizona*, 501 U.S. 624, 644 n.9 (1991) (citing *McMillan* as "relying on the fact that under Pennsylvania law possession of a weapon 'neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty' ") (quoting

McMillan, 477 U.S. at 88); *Witte v. United States*, 515 U.S. 389, 401 (1995) ("Significantly, we emphasized that the statute in issue [in *McMillan*] 'neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty' ") (quoting *McMillan*, 477 U.S. at 88); *see also Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1237 (1998) (Scalia, J., dissenting) ("No one can read *McMillan* without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime").

Recently, in *Almendarez-Torres*, the Court considered a challenge to 8 U.S.C. §1326, which makes it illegal for a deported alien to re-enter the United States without the permission of the Attorney General. Section 1326 carries a maximum penalty of 2 years imprisonment, except that the maximum increases to 10 years under subsection (b)(1) if the defendant was convicted of a felony before deportation, and to 20 years under subsection (b)(2) if the conviction was for an "aggravated felony." The defendant argued that the existence of a prior aggravated felony conviction under §1326(b)(2) is an element of an aggravated offense, not simply a sentencing factor. Because his prior conviction was not alleged in the indictment, as is required for all elements of an offense, the defendant contended that he was unlawfully sentenced in excess of the two-year maximum term of imprisonment.

After rejecting the argument that Congress intended that a defendant's prior aggravated felony conviction be included as an element of an aggravated offense under 8 U.S.C. §1326(b)(2), the Court addressed whether the Constitution nonetheless required that a defendant's prior

conviction must be treated as an element in order to subject the defendant to the 20-year statutory maximum set forth in section 1326(b)(2), rather than the two-year maximum set forth in section 1326(a). The Court held that the statute was not unconstitutional for treating recidivism as a sentencing factor, rather than as an element of the offense. *Almendarez* at 1223.

In doing so, the *Almendarez-Torres* decision relied on the nature of the underlying factor at issue – recidivism – as the critical reason why a defendant's prior conviction does not need to be treated as an element of a §1326(b)(2) offense to pass constitutional muster. The majority repeatedly stressed that the Constitution does not require that a defendant's prior conviction be deemed an element of a section 1326(b)(2) offense because recidivism is uniquely a sentencing factor that relates only to punishment, rather than to the circumstances of the offense. *See, e.g.*, 118 S.Ct. at 1230 ("the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"); *Id.* at 1232 ("we would also find it difficult to reconcile [the rule that any factor that significantly increases the statutory maximum should be deemed an element of the offense] with our precedent holding that the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes"); *Id.* at 1224 ("prior commission of a serious crime – is as typical a sentencing factor as one might imagine"); *Id.* at 1228 (the constitutional questions raised by the defendant "do not lead us to doubt gravely that Congress may authorize courts to impose longer sentences upon recidivists who commit a particular

crime"). After citing a long line of authority that emphasized that a defendant's "recidivism 'does not relate to the commission of the offense, but goes to the punishment only,' " *Almendarez-Torres* at 1231 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)); *see also Parke v. Raley*, 506 U.S. 20, 26 (1992); *Oyler v. Boles*, 368 U.S. 448, 452 (1962), the Court concluded that "to hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as " 'go[ing] to the punishment only.' " *Id.* at 1231 (quoting *Graham*, 224 U.S. at 629).

Recidivism is distinguishable from the facts of an offense because the existence of prior convictions, unlike facts relating to an offense, are easily verifiable matters that do not require additional findings of fact by a jury. [26] Moreover, the Court in *Almendarez-Torres* correctly noted that, due to the nature of recidivism, defendants may be significantly prejudiced if a prior conviction was considered to be an element of an offense so that a jury would learn that the defendant had been convicted of a prior

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[26] *See, e.g., United States v. McGatha*, 891 F.2d 1520, 1524 (11th Cir.) (prior felony convictions "are not submitted for jury consideration since no additional fact finding is necessary. . . . Prior convictions are highly verifiable matters of public record which may subject the defendant to undue prejudice if revealed to the jury at trial"), *cert. denied*, 110 S.Ct. 2199 (1990); *United States v. Brewer*, 853 F.2d 1319, 1326 (6th Cir. 1988) ("Prior convictions are highly verifiable matters which need not be subject to jury inquiry. Because defendants had received the totality of constitutional protections due in the prior proceedings, no additional fact finding is necessary."), *cert. denied*, 488 U.S. 946 (1990).

felony. 118 S.Ct. at 1226. This same risk of prejudice is not present when a jury is presented with evidence of a fact relating to the charged offense.

The majority in *Almendarez-Torres* downplayed the importance that *McMillan* placed on the fact that the Pennsylvania statute did not increase the maximum penalty as the reason why a fact of the offense did not need to be treated as an element for the statute to pass constitutional scrutiny. The Court in *Almendarez-Torres* indicated, however, that *McMillan*'s language was not determinative "in light of the particular sentencing factor at issue in this case – recidivism." 118 S.Ct. at 1231. The Court similarly distinguished *Mullaney* and *Patterson* on the ground that the immigration statute at issue "involves a sentencing factor – the prior commission of an aggravated felony – that is neither 'presumed' to be present, *nor need be 'proved' to be present, in order to prove the commission of the relevant crime.*" *Id.* at 1229 (emphasis added). *Almendarez-Torres* thus made clear that its decision rested on the unique nature of recidivism as a sentencing factor unrelated to the commission of the offense, rather than on cutting back on the principle that a fact of an offense that significantly increased the maximum penalty must be deemed an element of an offense under the Constitution. *See also* Welsh S. White, *Fact-Finding And The Death Penalty: The Scope of A Capital Defendant's Right To Jury Trial*, 65 Notre Dame Law Review 1, 25-27 (1989) (consistent with Supreme Court authority, a fact should be deemed an element of an offense if the fact relates to the circumstance of a crime rather than the character of the offender and the fact leads to a significantly enhanced sentence).

In this case, petitioner was convicted under the federal carjacking statute, 18 U.S.C. §2119. The statutory maximum sentence at the time of the offense was 15 years imprisonment under subsection (1), unless "serious bodily injury" resulted from the offense which raises the maximum penalty to 25 years imprisonment under subsection (2). 18 U.S.C. §2119 (1992). At the time of petitioner's trial, he had no notice at all of the serious bodily injury allegation. The government did not allege serious bodily injury in the indictment. J.A. 4. When petitioner was arraigned on the indictment, he was advised that the maximum possible sentence for the carjacking offense was 15 years imprisonment. J.A. 7. Moreover, no evidence of serious bodily injury was presented at trial, and the jury was not instructed to determine whether serious bodily injury resulted from the offense. J.A. 10. Nonetheless, after the sentencing judge concluded that the offense resulted in "serious bodily injury," petitioner was sentenced to 20 years imprisonment for his carjacking conviction – 5 years more than the maximum possible sentence under section 2119(1). J.A. 12.[27]

Under the instruction of *Specht*, *Mullaney*, and *McMillan*, Jones's 20-year sentence violates the Fifth and Sixth Amendments because he was sentenced above the 15-year statutory maximum set forth in section 2119(1) on the basis of a judicial finding of serious bodily injury that was neither alleged in the indictment, nor proven beyond

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[27] As set forth in the Statement of the Case, petitioner was originally sentenced to 25 years imprisonment on his carjacking conviction. On remand after appeal, the district court sentenced petitioner to 20 years for the carjacking offense.

a reasonable doubt to a jury. Unlike the recidivism factor at issue in *Almendarez-Torres*, serious bodily injury is a fact concerning the commission of the carjacking offense that a jury must find beyond a reasonable doubt after it is alleged in an indictment, in order to satisfy the Fifth and Sixth Amendments.

IV.

UNDER THE PRINCIPLE OF CONSTITUTIONAL DOUBT, SERIOUS BODILY INJURY SHOULD BE CONSTRUED AS AN ELEMENT OF THE OFFENSE OF CARJACKING UNDER 18 U.S.C. §2119

Under the principle of constitutional doubt, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts about it." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1916); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 465-466 (1989). "This canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). "The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections." *Almendarez-Torrez*, 118 S.Ct. at 1228.

In the previous section, petitioner has shown that if 18 U.S.C. §2119(1) through (3) are interpreted to be only sentencing factors, then the statute is unconstitutional. At the very least, if so construed, there would be grave constitutional questions as to the statute's validity. In addition, as discussed previously (see pages 10-29, *supra*), given the ambiguity in the statute, it is reasonable to construe serious bodily injury in 18 U.S.C. §2119 as an element of the offense, rather than as a sentencing factor. Under these circumstances, the principle of constitutional doubt requires the Court to construe serious bodily injury as an element of the offense. As the Eleventh Circuit stated in *United States v. Stone*, 1998 WL 191046 (11th Cir. (Fla.)) in holding that quantity and quality of the drug were elements of the offense, "[b]ecause we find that construing the third sentence of §844(a) to create a separate crime from that stated in the first sentence is a reasonable construction of the statute, we must adopt it to avoid the constitutional questions."

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed and that the case be remanded for resentencing, with a maximum punishment of 15 years on the carjacking count.

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APPENDIX

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Alabama *Wilson v. State*, 695 So. 2d 195, 199 (Ala. Crim. App. 1996)	"Causes serious physical injury to another." First Degree. Class A Felony. Ala. Code § 13A-8-41 (1997).	Robbery; second degree. Class B Felony. Ala. Code § 13A-8-42 (1997).
Alaska *Abdulbaqui v. State*, 728 P.2d 1211, 1214-15 (Alaska Ct. App. 1986)	"causes or attempts to cause serious physical injury to any person." First Degree. Class A Felony Alaska Stat. § 11.41.500 (Michie 1997).	Robbery in the second degree. Class B Felony. Alaska Stat. § 11.41.510 (Michie 1997).
Arkansas *Robinson v. Lockhart*, 823 F.2d 210, 212-13 (8th Cir. 1987)	"Inflicts or attempts to inflict death or serious physical injury upon another person." Aggravated Robbery. Class Y Felony. Ark. Code Ann. § 5-12-103 (Michie 1997).	Robbery. Class B Felony. Ark. Code Ann. § 5-12-102 (Michie 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Colorado *People v. Driggers*, 812 P.2d 702, 704-05 (Colo. Ct. App. 1991)	"knowingly wounds or strikes the person robbed or any other person with a deadly weapon" Aggravated Robbery. Class 3 Felony. Colo. Rev. Stat. Ann. § 18-4-302 (West 1997).	Robbery. Class 4 Felony. Colo. Rev. Stat. Ann § 18-4-301 (West 1997).
Connecticut *State v. Sewell*, 658 A.2d 598, 600 (Conn. Ct. App. 1995)	"Causes serious physical injury to any person who is not a participant in the crime." Robbery in the first degree. Class B Felony. Conn. Gen. Stat. Ann. § 53a-134 (West 1997).	Robbery in the second degree. Class C Felony. Conn. Gen. Stat. Ann. § 53a-135 (West 1997) (presence of accomplice or armed). --- Robbery in the third degree. Class D Felony. Conn. Gen. Stat. Ann. § 53a-136 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Delaware *Fullman v. State*, 389 A.2d 1292, 1299 (Del. 1978)	"Causes physical injury to any person who is not a participant in the crime." Robbery in the first degree. Class B Felony. Del. Code Ann., tit. 11, § 832 (1997).	Robbery in the second degree. Class E felony. Del. Code Ann., tit. 11, § 832 (1997).
Guam	"Intentionally inflicts or attempts to inflict serious bodily injury upon another." Robbery in the first degree. 9 Guam Code Ann. § 40.10 (1995). --- "Inflicts serious bodily injury upon another." Robbery in the second degree. 9 Guam Code Ann. § 40.20 (1995).	Robbery in the third degree. 9 Guam Code Ann. § 40.30 (1995).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Hawaii *State v. Doi*, 711 P.2d 736, 736-37 (Hawaii Ct. App. 1985)	" . . . intentionally or knowingly inflicts or attempts to inflict serious bodily injury upon another." Robbery in the first degree. Class A felony. Haw. Rev. Stat. Ann. § 708-840 (Michie 1997). --- " . . . recklessly inflicts serious bodily injury upon another." Robbery in the second degree. Class B felony. Haw. Rev. Stat. Ann. § 708-841 (Michie 1997).	

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Indiana *Burch v. State*, 569 N.E.2d 709, 712 (Ind. Ct. App. 1991)	"serious bodily injury to any person other than a defendant." Class A felony. Ind. Code Ann. § 35-42-5-1 (West 1997). --- "results in bodily injury to any person other than a defendant." Class B felony. Ind. Code Ann. § 35-42-5-1 (West 1997).	Robbery. Class C felony. Ind. Code Ann. § 35-42-5-1 (West 1997).
Iowa *State v. Masters*, 196 N.W.2d 548 (Iowa 1972)	"purposely inflicts or attempts to inflict serious injury" Robbery in the first degree. Class B felony. Iowa Code Ann. § 711.2 (West 1997).	Robbery in the second degree. Class C felony. Iowa Code Ann. § 711.3 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Kansas *State v. Whitaker*, 872 P.2d 278, 286 (Kan. 1994)	"Inflicts bodily harm upon any person in the course of such robbery." Aggravated robbery. Severity level 3, person felony. Kan. Stat. Ann. § 21-3427 (1996).	Robbery. Severity level 5, personal felony. Kan. Stat. Ann. § 21-3426 (1996).
Kentucky *Hubbard v. Commonwealth*, 932 S.W.2d 381, 383-84 (Ky. Ct. App. 1996)	"Causes physical injury to any person who is not a participant in the crime;" Robbery in the First Degree. Class B Felony. Ky. Rev. Stat. Ann. § 515.020 (Banks-Baldwin 1997).	Robbery in the Second Degree. Class C felony. Ky. Rev. Stat. Ann. § 515.030 (Banks-Baldwin 1997)
Minnesota *State v. Burrel*, 506 N.W.2d 34, 37 (Minn. Ct. App. 1993)	"inflicts bodily harm upon another" Aggravated Robbery in the first degree. Minn. Stat. Ann. § 609.245 (West 1997).	Simple Robbery. Minn. Stat. Ann. § 609.24 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Missouri *State v. Johnson*, 850 S.W.2d 365, 367 (Mo. Ct. App. 1993)	"Causes serious physical injury to any person;" Robbery in the first degree. Class A felony. Mo. Ann. Stat. § 569.020 (West 1997).	Robbery in the second degree. Class B felony. Mo. Ann. Stat. § 569.030 (West 1997).
New Hampshire *State v. Corey*, 497 A.2d 1196 (N.H. 1985)	"Inflicted or attempted to inflict death or serious injury on the person of another" Class A felony. N.H. Rev. Stat. Ann. § 636:1 (1996).	Robbery. Class B felony. N.H. Rev. Stat. Ann. § 636:1 (1996).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
New York *People v. Ruckdeschel*, 380 N.Y.S.2d 163 (N.Y. App. Div. 1976)	"Causes serious physical injury to any person who is not a participant in the crime;" Robbery in the first degree. Class B felony. N.Y. Penal Law § 160.15 (McKinney 1997). --- "Causes physical injury to any person who is not a participant in the crime;" Robbery in the second degree. Class C felony. N.Y. Penal Law § 160.10 (McKinney 1997).	Robbery in the third degree. Class D felony. N.Y. Penal Law § 160.05 (McKinney 1997).
North Dakota *State v. Clinkscales*, 536 N.W.2d 661, 663-64 (N.D. 1995)	"inflicts bodily injury upon another" Class B felony. N.D. Cent. Code § 12.1-22-01 (1998).	Robbery. Class C felony. N.D. Cent. Code § 12.1-22-01 (1998).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Ohio *State v. Fields*, 646 N.E.2d 866, 871 (Ohio Ct. App. 1994)	"Inflict, attempt to inflict, or threaten to inflict physical harm on another;" Felony of the second degree, Ohio Rev. Code Ann. § 2911.02(A)(2) (West 1998).	Robbery. Felony of the third degree. Ohio Rev. Code Ann. § 2911.02(A)(3) (West 1998).
Oregon *State v. Washington*, 531 P.2d 743 (Or. Ct. App.) *aff'd*, 543 P.2d 1058 (1975)	"causes or attempts to cause serious physical injury to any person." Robbery in the first degree. Class A felony. Or. Rev. Stat. § 164.415 (1997).	Robbery in the second degree. Class B felony. Or. Rev. Stat. § 164.405 (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Pennsylvania *Commonwealth v. Breakiron*, 571 A.2d 1035, 1042 (Pa. 1990)	"inflicts serious bodily injury upon another;" Robbery. Felony of the first degree. 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(l) (West 1997). --- "inflcits bodily injury upon another . . . " Robbery. Felony of the second degree. 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(iv) (West 1997).	Robbery. Felony of the third degree. 18 Pa. Cons. Stat. Ann. § 3701(a)(1)(v) (West 1997).
Rhode Island *State v. Beauchamp*, 671 A.2d 1238, 1241 (R.I. 1996)	"where a victim is injured" First degree robbery. R.I. Gen. Laws § 11-39-1(a) (1997).	Second degree robbery. R.I. Gen. Laws § 11-39-1(b) (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Tennessee *State v. Claybrooks*, 910 S.W.2d 868, 871 (Tenn. Crim. App. 1994) Sentencing Commission Comments to § 39-13-403	"where the victim suffers serious bodily injury." Especially aggravated robbery. Class A felony. Tenn. Code Ann. § 39-13-403 (1997). --- "where the victim suffers serious bodily injury." Aggravated robbery. Class B felony. Tenn. Code Ann. § 39-13-402 (1997).	Robbery. Class C felony. Tenn. Code Ann. § 39-13-401 (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Texas *Silva v. State*, 933 S.W.2d 715, 718 (Tex. Ct. App. 1996)	"causes serious bodily injury to another;" Aggravated Robbery. Felony of the first degree. Tex. Penal Code Ann. § 29.03 (West 1997). --- "intentionally, knowingly, or recklessly causes bodily injury to another;" Robbery. Felony of the second degree. Tex. Penal Code Ann. § 29.02 (West 1997).	
Utah *State v. Cantu*, 750 P.2d 591, 593-94 (Utah 1988)	"causes serious bodily injury on another;" Aggravated robbery. First degree felony. Utah Code Ann. § 76-6-302 (1997).	Robbery. Felony of the second degree. Utah Code Ann. § 76-6-301 (1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Virgin Islands *Government of the Virgin Islands v. Soto*, 718 F.2d 72, 74-75 (3d Cir. 1983)	"Causes physical injury which is incapacitating in any way to any person who is not a perpetrator of the crime;" Robbery in the first degree. V.I. Code Ann. tit. 14, § 1862 (1997). --- "Causes physical injury to any person who is not a participant in the crime." Robbery in the second degree. V.I. Code Ann. tit. 14, § 1863 (1997).	Robbery in the third degree. V.I. Code Ann. tit. 14, § 1864 (1997).
Washington *State v. Mahoney*, 699 P.2d 254, 255 (Wash. Ct. App. 1989)	"Inflicts bodily injury." Robbery in the first degree. Class A felony. Wash. Rev. Code Ann. § 9A.56.200 (West 1997).	Robbery in the second degree. Class B felony. Wash. Rev. Code Ann. § 9A.56.210 (West 1997).

STATE	"AGGRAVATED ROBBERY"	"ROBBERY"
Wyoming *Amin v. State*, 694 P.2d 119, 123 (Wyo. 1985)	"Intentionally inflicts or attempts to inflict serious bodily injury;" Aggravated robbery. Wyo. Stat. Ann. § 6-2-401(c)(l) (Michie 1997). --- "Inflicts bodily injury upon another;" Robbery. Wyo. Stat. Ann. § 6-2-401(a)(l) (Michie 1997)	